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IN THE

Supreme Court of the United States

October Term, 1963

~~No. 272~~

RAILWAY LABOR EXECUTIVES' ASSOCIATION, G. E. LEIGHTY and D. S. BEATTIE, *Appellants*

v.

UNITED STATES OF AMERICA, *Appellee*

and

INTERSTATE COMMERCE COMMISSION, SOUTHERN RAILWAY COMPANY, and CENTRAL OF GEORGIA RAILWAY COMPANY, *Intervenor-Appellees*

Appeal From The United States District Court For The Eastern District of Virginia

JURISDICTIONAL STATEMENT

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TABLE OF CONTENTS

	Page
Statement as to Jurisdiction	1
Opinions Below	2
Basis of Jurisdiction	2
Questions Presented	4
Statement of the Case	5
The Question Presented Is Substantial	12
Conclusion	21
Appendix A: Final Order of Dismissal	1a
Appendix B: Opinion of Court	2a
Appendix C: Report of Commission of November 7, 1962	10a
Appendix D: Report and Order of Commission on Reconsideration of June 10, 1963	28a
Appendix E: Supplemental Report and Order of Commission of February 17, 1964	39a

INDEX TO CITATIONS

CASES:

Brotherhood of Maintenance of Way Employes, et al. v. United States, et al., 366 U.S. 169, 81 S. Ct. 913, 6 L. Ed. 2d 206, reh. den. 366 U.S. 955, 81 S. Ct. 1901, 6 L. Ed. 2d 1247 ..... 3, 14

Chesapeake & Ohio-Baltimore & Ohio Control, 317 I.C.C. 261, 288-289 (1962) 15, 20

Interstate Commerce Commission v. Railway Labor Executives' Association, 315 U.S. 373, 62 S. Ct. 717, 86 L. Ed. 904 ..... 3, 13

Mississippi River Fuel Corporation v. Federal Power Commission, et al., (D.C. Cir., 1947) 163 F. 2d 433, 449 19

New Orleans Union Passenger Terminal, 282 I.C.C. 271 (1952) 14

Page

Railway Labor Executives' Association v. United States, 339 U.S. 142, 70 S. Ct. 530, 94 L. Ed. 721 (1950) 3, 13, 14, 18

Seaboard Air Line R. Co.-Atlantic Coast Line R. Co. Merger, 320 I.C.C. 122, 203 17

Secretary of Agriculture v. United States, et al., 346 U.S. 645, 654, 74 S. Ct. 826, 98 L. Ed. 1015, 1024 (1954) 18, 19

Securities and Exchange Commission v. Chenery Corp., et al., 318 U.S. 80, 87, 63 S. Ct. 454, 87 L. Ed. 626, 633 (1943) 19

Securities and Exchange Commission v. Chenery Corp., et al., 332 U.S. 194, 196-197, 67 S. Ct. 1575, 91 L. Ed. 1995, 1999 (1947) 19

Southern Ry. Co., et al. v. United States, et al., Civil Action 3276 (United States District Court for the Eastern District of Virginia) 17

United States, et al. v. Carolina Freight Carriers Corp., 315 U.S. 475, 488-489, 62 S. Ct. 722, 86 L. Ed. 971, 982-983 (1942) 21

United States v. Lowden, 308 U.S. 225, 60 S. Ct. 248, 84 L. Ed. 208 ..... 3, 13

STATUTES:

Federal Rules of Civil Procedure:

(28 U.S.C., Rule 59) 11

(28 U.S.C., Rule 60) 12

Interstate Commerce Act:

(54 Stat. 906, 49 U.S.C. § 5(2)) 2, 6, 13, 14

(54 Stat. 906, 49 U.S.C. § 5(2)(f)) 3, 4, 5, 6, 10, 13, 15, 18, 19, 20, 21

Judiciary and Judicial Procedure Act (62 Stat. 926, 28 U.S.C. § 1253) 3

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STATEMENT AS TO JURISDICTION

In compliance with Rules 13 and 15 of this Court, Railway Labor Executives' Association, G. E. Leighty and D. S. Beattie, appellants, submit this statement disclosing the basis upon which the Supreme Court of the United States has jurisdiction on appeal to review the final judgment and order of the United

States District Court for the Eastern District of Virginia at Alexandria, dated and entered on January 31, 1964, a copy of which is attached hereto as Appendix A.

OPINIONS BELOW

The opinion of the specially constituted District Court of three judges is reported at 226 F. Supp. 521, and a copy of the opinion is attached hereto as Appendix B.

The various reports of the Interstate Commerce Commission are found at 317 I.C.C. 557, 317 I.C.C. 729, and 320 I.C.C. .....[1] A copy of pertinent portions of the Commission's report found at 317 I.C.C. 557 is attached hereto as Appendix C, and copies of the latter two reports and orders of the Commission are attached hereto as Appendices D and E, respectively.

BASIS OF JURISDICTION

I

This is an action brought by the Railway Labor Executives' Association, its Chairman and its Executive Secretary-Treasurer to suspend, annul and set aside in part an order of the Interstate Commerce Commission entered pursuant to the provisions of Section 5(2) of the Interstate Commerce Act, 54 Stat. 906, 49 U.S.C. § 5(2).

II

The final judgment and order of the United States District Court for the Eastern District of Virginia at Alexandria was dated and entered on January 31, 1964. Notice of appeal was filed in said Court on March 30, 1964.

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[1] The latest report of the Commission in this case is not yet officially reported.

III

The jurisdiction of this Court to review an appeal of final judgment and order of the District Court is conferred by 28 U.S.C. § 1253, 62 Stat. 926.

IV

The following decisions, among others, sustain the jurisdiction of this Court to review the final judgment and order of the District Court on direct appeal in this case:

Brotherhood of Maintenance of Way Employes, et al., v. *United States, et al.*, 366 U.S. 169, 81 S. Ct. 913, 6 L.Ed. 2d 206, reh. den. 366 U.S. 955, 81 S.Ct. 1901, 6 L.Ed 2d 1247;

Railway Labor Executives' Association v. *United States*, 339 U.S. 142, 70 S.Ct. 530, 94 L.Ed 721;

Interstate Commerce Commission v. *Railway Labor Executives' Association*, 315 U.S. 373, 62 S. Ct. 717, 86 L.Ed 904;

United States v. *Lowden*, 308 U.S. 225, 60 S.Ct. 248, 84 L.Ed. 208.

V

The statutory provision involved is Section 5(2)(f) of the Interstate Commerce Act (54 Stat. 906; 49 U.S.C. § 5(2)(f)), which provides as follows:

"(f) As a condition of its approval, under this paragraph (2), of any transaction involving a carrier or carriers by railroad subject to the provisions of this part, the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected. In its order of approval the Commission shall include terms and conditions providing that during the period of four years from the effective date of such order such transaction will not result in employees of the carrier or carriers by railroad

affected by such order being in a worse position with respect to their employment, except that the protection afforded to any employee pursuant to this sentence shall not be required to continue for a longer period, following the effective date of such order, than the period during which such employee was in the employ of such carrier or carriers prior to the effective date of such order. Notwithstanding any other provisions of this Act, an agreement pertaining to the protection of the interests of said employees may hereafter be entered into by any carrier or carriers by railroad and the duly authorized representative or representatives of its or their employees."

QUESTIONS PRESENTED

The questions presented by this appeal are as follows:

1. Whether the Interstate Commerce Commission violated the requirements of Section 5(2)(f) that it provide a fair and equitable arrangement for the protection of employees by concluding it should impose the so-called "New Orleans" conditions upon findings purportedly supporting such conclusion but by adopting for imposition a formula of conditions contained in an appendix to its report, which conditions deleted certain basic protections found in the "New Orleans" conditions but which the Commission declared to be the "New Orleans" conditions thereby misleading all parties, its own counsel, and the court below.

2. Whether the Interstate Commerce Commission orders in this case which declare they impose a specific formula of protection but upon analysis appear not to do so and which misled the parties, the Commission's own counsel, and the court below, should be

set aside, annulled, and suspended because they are so imprecise, vague and confusing as to be subject to conflicting inferences.

3. Whether the Interstate Commerce Commission violated the requirements of Section 5(2)(f) that it provide protection for the "railroad employees affected" and the "employees of the carrier or carriers by railroad affected" as a result of approval of a transaction by including railroad employees affected by consolidation of facilities resulting from the transaction but by excluding from protection railroad employees affected by modernization of facilities resulting from the transaction.

STATEMENT OF THE CASE

This case involves the imposition of employee protective conditions under Section 5(2)(f) of the Interstate Commerce Act, 54 Stat. 906, 49 U.S.C. § 5(2)(f), which are so vague and confused that the Commission found it necessary to issue two clarifying reports; that all of the parties before the Court below misinterpreted them; that the Commission felt compelled to issue a supplemental report and order *sua sponte* clarifying the conditions following the decision of the Court below; and the railroad parties have brought a separate suit to set aside the supplemental order of clarification.[1a]

[1a] There is also pending before the United States Court of Appeals for the Fifth Circuit actions to compel Southern and Central to abide by their contractual obligations under the Washington Agreement, designated cases #21,016 and #21,023. There are also pending before the arbitration committee constituted under Section 13 of the Washington Agreement two cases charging Southern and Central with violations of that agreement in transferring Central work to Southern.

This is an appeal from a final judgment and order of a specially constituted United States District Court of three judges dismissing a complaint brought by the Railway Labor Executives' Association, G. E. Leighty, and D. S. Beattie, Chairman and Executive Secretary-Treasurer thereof, respectively, to suspend, enjoin, annul, and set aside in part orders of the Interstate Commerce Commission entered under Section 5(2) of the Interstate Commerce Act, 54 Stat. 906, 49 U.S.C. § 5(2), approving the acquisition of control of the Central of Georgia Railway Company, and its subsidiary, the Savannah & Atlanta Railway Company, by the Southern Railway Company through the purchase of the stock of the former by the latter, subject to certain conditions for the protection of employees imposed purportedly in accordance with the requirements of subparagraph (f) of Section 5(2).

During the course of the proceedings before the Commission, the Association took the position that the Commission should impose conditions which would permit the abolishment of jobs as employees left the service through death, retirement, resignation, and dismissal for just cause. It was also the position of the Association that if the Commission did not imposes such "attrition" conditions, it was, at the very least, required by the mandate of Section 5(2)(f) to impose the "New Orleans" conditions modified by effective provisions to protect the various incidents of employment (excepting the job itself) and by a detailed arbitration provision which could not be ignored by the Southern as it had ignored such provisions in past cases forcing employees into the courts to secure their rights under the conditions imposed by the Commission in those cases.

The Commission denied the Association's request for the imposition of "attrition" conditions but agreed that the "New Orleans" conditions should be imposed; agreed that all incidents of employment should be protected; and, agreed that an effective arbitration provision had to be provided. The Commission thereupon set forth in Appendix II to its report a formula of conditions which, it held, contained all of the provisions of the "New Orleans" conditions with but one minor change—a detailed compulsory arbitration procedure for the resolution of all claims arising under the formula of protection therein contained.

As this Court knows, the "New Orleans" conditions consist merely of the adoption by reference of the provisions of the so-called "Washington Agreement" and those of the "Oklahoma" conditions to run concurrently from the effective date of the Commission's order. The provisions of the "Oklahoma" conditions by their terms expire four years after the effective date of the Commission's order; the provisions of the "Washington Agreement" do not. Two of the most important provisions of "New Orleans" are to be found in Sections 4 and 5 of the Washington Agreement which require railroads intending to effect consolidation of their facilities to give at least 90 days' notice of such intended consolidations and to negotiate and execute with representatives of their employees, agreements as to the application of the protections to be afforded affected employees, and the selection and assignment of employees to man the consolidated operations, which selection and assignment must be made from the work forces of the carriers involved. In case of failure to agree, provision is made for arbitration.

These provisions are of primary importance for numerous reasons not the least of which is the protection against loss of an employee's hard earned seniority rights as far as reasonably possible; the prevention of the offer of straw, menial or dangerous jobs at distant points with no accumulated seniority rights, the rejection of which would mean loss of all protection; protection against an employee's being required to sell his home and move his family hundreds of miles to a job which will be abolished within a few months or weeks; and, protection against having to report and be available for temporary work hundreds of miles away even though work may be available at such distant points but one or two days a week. Analysis of the provisions of the Washington Agreement and, therefore, the "New Orleans" conditions, will reveal that the proper application of its provisions is predicated upon an agreement first having been executed pursuant to Sections 4 and 5.

The Southern requested reconsideration of the report containing the "Appendix II" conditions because that railroad objected to the Commission's requirement that it agree to arbitrate disputes arising under the conditions. Southern also objected to the Commission's rejection of Southern's attempt to have excluded from protection employees adversely affected by "internal economies" and plant modernization Southern might effect when it acquired stock control, the Commission having left such matters to be determined by arbitrators on the question of whether, in fact, the adverse effects to employees resulted from approval of the transaction. The Association requested reconsideration because the Appendix II conditions were not the "New Orleans" conditions.

though obviously intended to be, because *inter alia* they did not contain the very important provisions of the "New Orleans" conditions discussed above.

The Commission thereupon issued a further report denying the Association's petition *in toto* without discussing it and rejecting Southern's objections to arbitration. The Commission, however, granted Southern's request to restrict the scope of the protection with the enigmatic holding that "it is not our intention that employees affected by such internal improvements shall be entitled to the benefit of the conditions," "*even* if made possible by improved financial circumstances *partly* attributable to the unification." (Appendix D hereto, p. 33a, italics supplied.)

Immediately upon the issuance of the report on reconsideration, the Southern had Central abolish some 800 jobs. It also refused to apply Sections 4 and 5 and began offering clerical employees jobs as trainmen, messenger boys, etc., at distant points with no seniority rights on threat of losing of all protection upon refusal to accept the offers. Other senior employees with Central were offered similarly unacceptable jobs. Some employees accepted the offers out of fear of losing all future protection; many of those who refused were told they were entitled to no further protection. In some isolated instances Southern unilaterally and arbitrarily decided to allow some employees separation pay while refusing others.

The Association filed suit in the United States District Court for the Eastern District of Virginia to enjoin, annul, set aside and suspend the reports and orders of the Commission "insofar as they fail to carry out the mandate of Congress contained in Sec-

tion 5(2)(f)". Briefs were filed by all parties and argument was held on December 4, 1963, before the specially constituted three judge court at which counsel for *all* parties contended that the Appendix II conditions complained of did not contain Sections 4 and 5 of the Washington Agreement.

The District Court issued its decision and order on January 31, 1964, in which it held that under the provisions of Section 5(2)(f) of the Act the Commission could withhold the protection of Sections 4 and 5 of the Washington Agreement and compounded the existing confusion regarding protection against the effects of "internal improvements" resulting from Commission approval of the transaction with the following statement:

> "We need not determine the legality or propriety of the comments of the Commission thus made because that portion of its Order of November 7, 1962 was amended by the Commission in its Order of June 10, 1963. There the Commission held as a matter of law that certain adverse effects attributable to internal technological improvements create no liability under Section 5(2)(f). It did not limit or restrict the protection afforded "affected employees" under the statute. It only reserved for arbitration unsettled disputes resulting from the transaction. In so doing it was plainly right.
>
> The subject matter to be submitted to arbitration under the condition here imposed[7] is crucial because the decision of the arbitration tribunal on all disputed factual and legal issues within the scope of the submission is final, binding and conclusive.

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[7] Condition 6, [in Appendix II to the Commission Report set forth in Appendix C hereto]."

On February 27, 1964, the Commission, *sua sponte,* issued a further supplemental report and order in the case (Appendix E attached hereto) in which it held that *all the parties and its own counsel had misinterpreted* the conditions it had imposed when they argued to the District Court that Sections 4 and 5 of the Washington Agreement were not included in its Appendix II conditions. On that same date, the General Counsel of the Commission forwarded a copy of that order to the District Court together with a letter which stated in part:

> "Subsequent to this Court's decision, the Commission ascertained that its counsel had misinterpreted the conditions which the Commission had imposed for the protection of employees who might be adversely affected by the transaction. The Commission states in the Supplemental Report (p. 2) that its first report, referring to 317 I.C.C. at 565-566, 'incorporated all the provisions of the *New Orleans* conditions, which embraced the provisions of the Washington Agreement, except as specifically modified in Appendix II[2] [of the first report].' This means, for example, contrary to the position taken by Mr. Goodman and me as counsel for the Commission in brief and oral argument, that the conditions prescribed by the Commission in this proceeding embrace the procedural provisions of Sections 4 and 5 of the Washington Agreement and the lump sum separation allowance provision of Section 9 of that Agreement."

This notice of appeal was filed on March 30, 1964.

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[2] Said modifications are not relevant here as they deal solely with outside earnings and arbitration of disputes.

THE QUESTION PRESENTED IS SUBSTANTIAL

The question presented by this appeal is substantial. Although jurisdiction in this case is conferred as a matter of right by statute, it is significant that several of the important reasons which guide this Court in exercising its discretion to grant petitions for certiorari are present here and attest to the substantial nature of the question presented.

First, the District Court has decided an important question involving the construction of a federal statute enacted in the interests of the morale and welfare of all employees comprising the railroad labor force in the United States and in furtherance of the national transportation policy. The question has not been, but should be, decided by this Court particularly in view of the many railroad meregers and acquisitions recently decided by and presently pending before the Commission in which the Appendix II conditions have been and will be imposed by the Commission resulting in the deprivation of the statutory and contractual rights of thousands of employees in that industry.

Second, the question has been determined by the District Court contrary to the interpretation placed upon the "fair and equitable" provisions of Section 5(2)(f) by this Court and contrary to the clearly expressed intent of the Congress.

Third, the District Court in supporting its decision acted contrary to applicable decisions of this Court governing the validity of administrative orders which are so vague and imprecise as to be subject to conflicting inferences and which do not conform to the agency's findings.

Fourth, the District Court decision in itself comes within the long established rule of this Court which requires the setting aside of District Court findings where it is uncertain what they mean.

Each of the reasons for regarding the question as substantial will be briefly discussed hereunder:

A.

1. It is now well established by decisions of this Court and acts of Congress that the morale and welfare of the labor force in the railroad industry is of importance to the United States. *United States* v. *Lowden*, 308 U.S. 225, 60 S.Ct. 248, 84 L.Ed. 208; *Interstate Commerce Commission* v. *Railway Labor Executives' Association*, 315 U.S. 373, 62 S.Ct. 717, 86 L.Ed. 904; *Railway Labor Executives' Association* v. *United States*, 339 U.S. 142, 70 S.Ct. 530, 94 L.Ed. 721. It is also beyond question that Section 5(2)(f) was enacted in furtherance of the national transportation policy. When Congress liberalized the merger provisions of the Interstate Commerce Act by the enactment of Section 5(2), it added to that section a subparagraph (f) to protect the welfare and preserve the morale of railroad employees in the face of the great economic threat posed by the liberalization of the merger provisions.

2. The primary question now before this Court has not been specifically ruled upon by it but it should be decided by this Court. The Congress enacted Section 5(2) to ease the way for voluntary merger of railroads in this country. At the same time, Congress was aware that much of the greater part of all savings accomplished through the merger of railroads is

realized at the sole and direct expense of the labor force and so it provided specific protection for the employees which it would injure as the result of the enactment of Section 5(2). The Congress attached to the merger provision a subparagraph which required the Commission to condition any merger authority conferred pursuant to Section 5(2) upon a "fair and equitable arrangement" for the protection of employees which must, as a minimum, contain terms providing that an employee shall not be placed "in a worse position with respect to his employment" for at least four years following the effective date of the Commission's order of approval. The legislative history of these provisions is crystal clear—the "fair and equitable" requirement meant the "Washington Agreement" and the "no worse position with respect to employment" requirement was intended to keep an employee completely whole financially for at least four years, including compensation for wages, fringe benefits, and other incidents of employment.

Following this Court's decision in *Railway Labor Executives' Association* v. *United States,* 339 U.S. 142, 70 S.Ct. 530, 94 L.Ed. 721 (1950), the Commission imposed the so-called "New Orleans" conditions which specifically adopts and applies all the provisions of the Washington Agreement with one exception, not relevant here, involving outside earnings of an employee receiving a "dismissal" or "coordination" allowance. *New Orleans Union Passenger Terminal* case, 282 I.C.C. 271 (1952). These conditions have been imposed consistently by the Commission in those cases in which some delay in adverse effects to employees may take place, as well as in other cases, as this Court recognized in its decision in *Brotherhood*

of Maintenance of Way Employes v. *United States*, 366 U.S. 169, 81 S.Ct. 913, 6 L.Ed. 2d 206.

In this case, however, the Commission imposed a novel formula of conditions which departed substantially from "New Orleans" by deleting all the protections of the "Washington Agreement" for the first four years following the effective date of the Commission's order. Had the Commission intended the deprivation of this protection and made no findings to support such deprivation as "fair and equitable" under the facts of this particular case, it would have violated the provisions of Section 5(2)(f), as well as those provisions of law governing the necessity for findings to support conclusions. Here, however, the Commission did a unique thing: It held that the conditions it was attaching as Appendix II to its report and imposing in this case *were* the "New Orleans" conditions.[3] It repeated this holding one month later in the *Chesapeake & Ohio-Baltimore & Ohio Control* case, 317 I.C.C. 261, 288-289 (1962), and again repeated it six months later in its Report on Reconsideration in the instant case. (See Appendix D, p. 34a attached hereto.)

The Court below ignored the Commission's conclusion that the Appendix II conditions *were* the "New Orleans" conditions and held that the Commission was not bound to impose "New Orleans" but was "free in its discretion . . . to impose different conditions predicated upon different facts of record relating to each individual transaction". (Appendix B, pp. 5a, 6a). This conclusion of the District Court contradicts

[3] With one exception, not relevant here, involving the inclusion of a more detailed and specific arbitration provision.

the Commission's very specific holding that it was not "imposing different conditions" but was imposing "New Orleans". (Appendix C, pp. 16a, 20a; Appendix D, p. 34a.)

Appellants contended that the removal of the protections of the Washington Agreement as found in "New Orleans" without specific findings justifying such removal could be neither "fair" nor "equitable" under the statute. The lower court, however, held that that contention to be without merit—not because such specific findings were present[4] but—because "to hold otherwise would deprive the Commission of its statutory duty of imposing fair and equitable conditions predicated upon its evaluation of the facts of record relating to each individual transaction".[5] (Appendix B, p. 6a.) In essence, the court below holds that an administrative agency will be upheld in reaching a conclusion contrary to that agency's past practice even though the agency has made no findings to support such a change and, indeed, has held that it is making no change.[6]

The parties below, including counsel for the Commission, read the Appendix II conditions as exclud-

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[4] Such a conclusion could not be reached by the District Court because the Commission held it was not changing "New Orleans" and obviously made no finding to justify a change it was not making.

[5] The only finding of the Commission was that "New Orleans" should be imposed. (Appendix C, pp. 16a, 20a; Appendix D, p. 34a.)

[6] The single modification the Commission intended to make in "New Orleans," irrelevant here, involved the arbitration provision and there the Commission made very specific findings on the factual record as to its reasons for making that single modification. (Appendix C, pp. 16a, 17a.)

ing all of the provisions of the Washington Agreement as found in "New Orleans". Two days before the hearing before the District Court, the Commission reached, but did not release, its decision in the *Seaboard Air Line R. Co.-Atlantic Coast Line R. Co. Merger* case, 320 I.C.C. 122. The decision was released nine days after the hearing in the Court below. It adopted the Appendix II conditions from the instant case and specifically held that those conditions *included* all of the provisions of the Washington Agreement (320 I.C.C. at 203).

On January 31, 1964, the court below issued its decision and order dismissing appellants' complaint. On March 6, 1964, the Commission issued a further order in the *Seaboard* case adopting the Appendix II conditions as clarified in a February 27, 1964 order issued in the instant case. The February report and order is attached hereto as Appendix E. It was issued *sua sponte* by the Commission and states that the parties below, including its own counsel, were wrong in their interpretation of the Appendix II conditions and that those conditions specifically included all the protections of the Washington Agreement commencing on the effective date of the Commission's order approving the transaction (January 9, 1963).[7] On the same date this supplemental report and order were issued, the general counsel of the Commission addressed to each of the three judges on the court below the letter which is quoted in part above at page 11.

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[7] The Southern and the Central of Georgia recently filed suit to set aside as invalid the February 27 report and order of the Commission in *Southern Ry. Co., et al.* v. *United States, et al.*, Civil Action No. 3276, United States District Court for the Eastern District of Virginia. Regardless of the outcome of that case, however, the Commission has made clear its intent and purpose in imposing the Appendix II conditions.

Virtually, every major railroad in the United States is involved to some extent in past, prospective or pending merger and acquisition proceedings. The lives and livelihoods of tens of thousands of railroad employees and their dependents are to be affected. The proper interpretation of the "fair and equitable" clause of Section 5(2)(f) is vital to them. To permit the decisions of the court below and the Commission to stand as depriving employees of the protections of Sections 4 and 5 would do violence to the letter, as well as the spirit of the "fair and equitable" requirements of the statute as well as to the decisions of this Court which have held that agency conclusions must be based upon specific findings. *Secretary of Agriculture* v. *United States, et al.*, 346 U.S. 645, 654, 74 S.Ct. 826, 98 L.Ed. 1015, 1024 (1954), and cases cited therein.

To permit the decisions below to stand would render the "fair and equitable" requirement a nullity since it is clear that if these employees were deprived of the protections of Sections 4 and 5 they were so deprived through inadvertence on the part of the Commission and obviously without findings to support such a deprivation of protection. If an unintentional deprivation of protection constitutes a "'fair and equitable arrangement" within the meaning of Section 5(2)(f), then *any* deprivation of protection would be equally "fair and equitable".

Many major railroad merger and acquisition cases have yet to be passed upon by the Commission. Section 5(2)(f) will be applicable to each case. If the decisions below are permitted to stand, that provision of law will be rendered worthless. Cf. *Railway Labor Executives' Association* v. *United States, et al.*, 339 U.S. 142, 70 S.Ct. 530, 94 L.Ed. 721.

B.

The decisions of the Commission and the District Court contravene those decisions of this Court which have held that orders of administrative agencies are invalid when they are imprecise, vague and confusing and leave the courts with the task of choosing between conflicting inferences. *Secretary of Agriculture* v. *United States, et al.*, 346 U.S. 645, 654, 74 S.Ct. 826, 98 L.Ed. 1015, 1024 (1954); *Securities and Exchange Commission* v. *Chenery Corp., et al.*, 332 U.S. 194, 196-197, 67 S.Ct. 1575, 91 L.Ed. 1995, 1999 (1947). Certainly, it cannot be denied that the "protective" conditions imposed here fall within that rule when the Commission's own legal staff, as well as the parties, misinterpreted those conditions in very fundamental and vital respects.

The decisions below also contravene those well reasoned decisions of this and other courts which hold that an agency order is invalid if it purports to impose or follow a specific theory or formula but does not do so. *Securities and Exchange Commission* v. *Chenery Corp., et al.*, 318 U.S. 80, 87, 63 S.Ct. 454, 87 L.Ed. 626, 633 (1943); *Mississippi River Fuel Corporation* v. *Federal Power Commission, et al.*, (D.C. Cir., 1947) 163 F.2d 433, 449. As the court in the *Mississippi Fuel* case holds, to declare such acts valid would leave the parties and the courts impotent to prevent government by administrative fiat for "the prescribed judicial review would be set wholly at naught by any such procedure." (163 F.2d at 449.)

C.

The decisions below are also vague and confusing with respect to the apparent restriction placed upon the terms "railroad employees affected" and "em-

ployees of carrier or carriers by railroad affected" as found in Section 5(2)(f). If the vague language utilized by the Commission (Appendix D, p. 33a) and the District Court (Appendix B, pp. 7a, 8a) are to be given any effect, it must be to restrict the protection afforded railroad employees by the statute. The Congress very clearly wished to protect all railroad employees "affected" by its liberalized merger statute. Whether one is a "railroad employee" is a question of fact rather easily resolved. Whether one is affected "as a result" of the transaction approved is also a question of fact, often complex and difficult to resolve and one that can be resolved only after the fact occurs. The Commission in all previous cases in which the issue has arisen, in its original decision in this case (Appendix C, pp. 19a, 20a) and in the *C&O-B&O Control* case, 317 I.C.C. 261, 288-289 (1962), has consistently maintained that these were questions of fact to be determined by arbitration in particular factual situations. However, in its report on reconsideration (Appendix D, pp. 32a, 33a) the Commission reversed this stand and held that employees affected by so-called "internal economies" even though brought about "partially" by the merger or acquisition are not to be protected. Since basically there are but two ways an employee can be adversely affected following an acquisition or merger—by consolidation or coordination of facilities and by internal economies (made possible by modernization of plant or otherwise)—the Commission and the Court below have read into Section 5(2)(f) a severe restriction which cannot be found in the plain, literal language of the provision, its legislative history or twenty-three years of interpretation and application by the Commission itself.

If it cannot be said to restrict the protection afforded by the statute, the language of the Commis-

sion and the Court below is so vague and confusing as to be meaningless and invalid and should be struck down for that reason. To permit it to stand would result in the deprivation of protection for the employees of the Central of Georgia Railroad as well as the many thousands of employees of those railroads whose merger and acquisition applications are to follow. Cf. *United States, et al.* v. *Carolina Freight Carriers Corp.*, 315 U.S. 475, 488-489, 62 S.Ct. 722, 86 L.Ed. 971, 982-983 (1942).

CONCLUSION

It is respectfully submitted for the foregoing reasons that jurisdiction should be noted in this case.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

At Alexandria

Civil Action No. 3004

RAILWAY LABOR EXECUTIVES' ASSOCIATION, et al., Plaintiffs

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, SOUTHERN RAILWAY COMPANY, and CENTRAL OF GEORGIA RAILWAY COMPANY, Defendants

Final Order of Dismissal

Upon consideration of the pleadings and the evidence, as well as the briefs and oral arguments of counsel, the Court concludes, for the reasons set forth in its written opinion this day filed, that the orders of the Interstate Commerce Commission herein complained of in Southern Railway—Control—Central of Georgia Railway Company, Finance Docket No. 21400, are not erroneous and, therefore, it is

ORDERED that the complaint in this action be, and it is hereby, dismissed, the defendants recovering their costs of the plaintiff.

/s/ ALBERT V. BRYAN
United States Circuit Judge

/s/ OREN R. LEWIS
United States District Judge

/s/ JOHN D. BUTZNER, JR.
United States District Judge

January 31, 1964

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

At Alexandria

Civil Action No. 3004

RAILWAY LABOR EXECUTIVES' ASSOCIATION, et al., Plaintiffs

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, SOUTHERN RAILWAY COMPANY, and CENTRAL OF GEORGIA RAILWAY COMPANY, Defendants

Opinion

(Argued December 4, 1963. Decided January 31st, 1964.)

Before Bryan, Circuit Judge, and Lewis and Butzner, District Judges.

William G. Mahoney (William H. King and James L. Highsaw, Jr. on brief) for plaintiffs;

Leonard S. Goodman (Robert W. Ginnane, General Counsel of Interstate Commerce Commission, Thaddeus J. Harty, Jr., William H. Orrick, Jr., Assistant Attorney General, Elliott H. Moyer, Attorney, Department of Justice, Claude V. Spratley, Jr., United States Attorney, Plato Cacheris, First Assistant United States Attorney, on brief) for defendants Interstate Commerce Commission and United States of America;

Jack R. Turney, Jr. (Armistead L. Boothe, W. Graham Claytor, Jr., William D. McLean and John B. Miller, on brief) for defendants Southern Railway Company and Central of Georgia Railway Company.

Oren R. Lewis, District Judge:

This is an action brought by the Railway Labor Executives' Association to enjoin, set aside and annul, insofar

as they relate to conditions for the benefit of employees, Reports and Orders of the Interstate Commerce Commission entered November 7, 1962, December 3, 1962, and June 10, 1963, in a proceeding entitled "Southern Railway —Control—Central of Georgia Railway Company, Finance Docket No. 21400," which approved, pursuant to Section 5(2) of the Interstate Commerce Act (49 U.S.C. 5(2)), Southern's acquisition of stock control of Central.[1]

The plaintiff association is an unincorporated association with which are affiliated twenty-three standard railway labor organizations representing, under the Railway Labor Act (45 U.S.C.A. 151, et seq.), the bulk of the nation's railway employees.

R.L.E.A., speaking for the "railroad employees affected," charges that the "conditions" imposed by the Commission in this case fall short of the minimum requirements of the second sentence of Section 5(2)(f) of the Interstate Commerec Act, and lack the "fairness and equity" provided for in the first sentence of the Act.

The Commission, in approving the transaction, was fully advised of the proposed consolidation of Central's freight agencies, yards, shops and accounting department into those of Southern, together with the resultant job losses entailing substantial hardship to many employees and their families. In the alleviation of these hardships the Commission imposed conditions [2] for the protection of the employees thus affected, which it determined more than met the statutory requirements of Section 5(2)(f) and would be fair and equitable.

The conditions thus imposed were formulated and adopted after extended discussion of the proposals ad-

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[1] The reports of the Commission are published in 317 I.C.C. 557 (1962) and in 317 I.C.C. 729 (1963).

[2] The conditions imposed in this transaction are attached hereto as Appendix A. [Set forth in this appendix at pages 20a-27a.]

vanced by the respective parties, and review of the conditions imposed by the Commission in approving other transactions.

Our jurisdiction as the statutory reviewing Court is limited to determining whether the Interstate Commerce Commission's Orders are legally valid. Viewed in that light, the Orders complained of must be upheld and the complaint dismissed.

R.L.E.A. centers its attack upon the refusal of the Commission to impose conditions which would:

(a) Require proposed consolidation of facilities resulting from the transaction be with the consent of, or after arbitration with, representatives of employees of both carriers.

(b) Grant affected employees dismissal or displacement compensation upon refusal to accept carrier-offered employment involving a change of residence.

(c) Continue all former "fringe benefits" of dismissed employees notwithstanding their termination, for all retained employees on the home road.

(d) Grant employees an option of lump-sum separation payment in lieu of payments over the protection period.

Support for these proffered conditions is predicated upon R.L.E.A.'s interpretation of the word "employment" as it appears in the phrase "worse position with respect to employment," in Section 5(2)(f), and upon their being incorporated in the "New Orleans" conditions. R.L.E.A. says the word "employment" includes: type of work performed—the place of work—and the seniority rights in the work.

The "Maintenance of Way" case[3] does not support them in that interpretation. To the contrary, the Supreme Court in that case cited with approval the opinion expressed by interested parties, including the affected Union, that "compensation protection for discharged employees was the intendment of paragraph 5(2)(f)."

Subparagraph (f)[4] of paragraph 5(2)[5] requires that the Commission, in approving a transaction under that section, impose conditions which will be fair and equitable to the employees affected by the transaction, and provides that such transactions will not result in worsening employees' positions with respect to their employment during the four years following the effective date of the order or their period of service, whichever is less. "New Orleans" is nowhere mentioned therein. The Commission is free in its

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[3] Brotherhood of Maintenance of Way Employees v. United States, 366 U.S. 169 (1961).

[4] "As a condition of its approval, under this paragraph, of any transaction involving a carrier or carriers by railroad subject to the provisions of this chapter, the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected. In its order of approval the Commission shall include terms and conditions providing that during the period of four years from the effective date of such order such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment, except that the protection afforded to any employee pursuant to this sentence shall not be required to continue for a longer period, following the effective date of such order, than the period during which such employee was in the employ of such carrier or carriers prior to the effective date of such order. Notwithstanding any other provisions of this chapter and chapters 8 and 12 of this title, an agreement pertaining to the protection of the interests of said employees may hereafter be entered into by any carrier or carriers by railroad and the duly authorized representative or representatives of its or their employees."

[5] 49 U.S.C., Section 5(2).

discretion to make different findings, to reach different conclusions, and to impose different conditions predicated upon its evaluation of the facts of record relating to each individual transaction, so long as it does not fail to meet the minimum statutory criteria and is fair and equitable.

Here, the Commission reviewed all of the conditions it had adopted in other transactions, and expressly modified the arbitration provisions embodied in the "Oklahoma" and "New Orleans" conditions before adopting the conditions imposed in this case, and the record amply supports its conclusions.

Assuming, arguendo, says R.L.E.A., that the minimum requirements of the second sentence of Section 5(2)(f) have been met in this case, the Commission failed to meet the fair and equitable requirements of the first sentence of Section 5(2)(f) because it is neither fair nor equitable to remove from the conditions imposed, without reason, many of the protections which employees have so long enjoyed under the "Oklahoma" and "New Orleans" conditions. This contention is without merit. To hold otherwise would deprive the Commission of its statutory duty of imposing fair and equitable conditions predicated upon its evaluation of the facts of record relating to each individual transaction. We hold the conditions imposed in this case are fair and equitable and meet the minimum requirements of the statute.

The Southern, during the discussion of the proposed conditions, took the position that none of them should afford benefits to employees who may be adversely affected subsequent to the acquisition of control by reason of internal technological improvements and economies effected by Central, and requested the Commission to so hold. In refusing this request the Commission said:

> "We may not by interpretation narrow the scope of the protection intended by the statute . . . . Questions as to whether adverse effects suffered by particular

employees in their employment result from the transaction are questions of fact which can be determined under the circumstances of particular cases and must be left for the determination of the arbitrators in case of dispute."

Upon reconsideration the Commission, in its report of June 10, 1963, said:

"It is plain under the conditions that an employee would be entitled to benefits if adversely affected by a co-ordination of the operations of [Southern] and Central or by the shifting of functions from one to the other. However, the 'effect' of subsequent internal technological improvements by either of the carriers, even if made possible by improved financial circumstances partly attributable to the unification of control, is too indirect and remote to be considered a result of the transaction; and it is not our intention that employees affected by such internal improvements shall be entitled to the benefit of the conditions."

R.L.E.A. claims this is a complete reversal of the "law of the case" without reason,* and is an unlawful attempt on the part of the Commission to limit and restrict the protection afforded "affected employees" under Section 5(2)(f).

We need not determine the legality or propriety of the comments of the Commission thus made because that portion of its Order of November 7, 1962 was amended by the Commission in its Order of June 10, 1963. There the Commission held as a matter of law that certain adverse effects attributable to internal technological improvements create no liability under Section 5(2)(f). It did not limit or restrict the protection afforded "affected employees"

* The Commission had ample power to modify or change its Order of November 7th.

under the statute. It only reserved for arbitration unsettled disputes resulting from the transaction. In so doing it was plainly right.

The subject matter to be submitted to arbitration under the condition here imposed [7] is crucial because the decision of the arbitration tribunal on all disputed factual and legal issues within the scope of the submission is final, binding and conclusive.

R.L.E.A. next attacks the failure of the Commission to impose conditions for the protection of the employees of Frisco, particularly those employed in its Birmingham yard, upon the ground they are affected employees under the holding of this Court in Railway Labor Executives' Association, et al. v. United States of America, et al. (216 F.Supp. 101 (1963)).

Our ruling in that case cannot be so construed. We there held:

> "All 'employees affected' are under the aegis of the Act. The only question is whether they are 'affected.'"

The transaction in that case was the acquisition by Seaboard of the use of the Broad Street station. Here the transaction is Southern's acquisition of stock control of Central with the resultant consolidation of some of Central's facilities with those of Southern.

Frisco is a party to the transaction here under discussion only in the capacity of a beneficial owner of the Central stock, and the transaction will not unify ownership or control of its railroad operations with those of any other carrier.

The Commission found factually that the employees of Frisco are not employees who will be affected by its order

[7] Condition 6, Appendix A.

within the meaning of Section 5(2)(f). This finding is amply supported by the record.

Frisco's Birmingham yard is manned by Frisco employees whose seniority rosters and interchangeable assignments are intermingled with other Frisco employees whose duties have nothing to do with the yard operation. Central's withdrawal from Frisco's Birmingham yard may have been an economical loss to Frisco and some of Frisco's employees may have been affected as a result thereof, but the withdrawal does not sufficiently touch the transaction here under discussion to warrant 5(2)(f) protection. Further, it could have been unilaterally accomplished at any time on six months' inotice independent of Commission approval.

Other assaults of R.L.E.A. upon the Orders of the Commission are also rejected.

The complaint will be dismissed.

APPENDIX C

INTERSTATE COMMERCE COMMISSION

Finance Docket No. 21400

SOUTHERN RAILWAY COMPANY—CONTROL—CENTRAL OF GEORGIA RAILWAY COMPANY

Decided November 7, 1962

* * * * * * * * * * *

Employees.—Applicant estimates that the proposed consolidation of the Central's freight agencies, yards, shops, and accounting department into those of applicant will result in the elimination of between 814 and 824 jobs held by Central employees and 4 held by applicant's employees. The association questions this estimate, but the number of jobs to be affected by the proposed consolidations is a matter under the control of applicant and concerning which its officers have more accurate information. Accordingly, we accept its estimate as substantially correct. We recognize, however, as pointed out by the association, that the number of employees who would be affected, no doubt, would exceed the number of jobs abolished, because of the so-called bumping process under which, through the exercise of seniority rights established by collective bargaining agreements, an employee whose position is abolished may displace another, who in turn may displace an employee junior on the seniority roster involved, and so on.

Consummation of the proposed transaction unquestionably will result in substantial hardship to many employees and their families. However, we are not persuaded that the application should be denied for this reason. While the

number of available jobs will be reduced, at least temporarily, the remaining jobs will be made more secure. In this connection, it is noteworthy that, without any coordination such as that planned, the average number of persons employed by the Central has been reduced from 6,737 in 1945 to 3,421 in 1960. The future of all the employees of the Central is far from bright unless this trend can be arrested. Affiliation of the Central with applicant will strengthen its ability to render adequate and efficient service and to continue its operations on a sound financial basis. Some such affiliation appears necessary to avoid further deterioration in its earnings and competitive position and, possibly, insolvency.

In authorizing the transaction, we are not unmindful of the fact, stressed by the association on exceptions, that future technological improvements, made possible by increased earnings as a result of the economies which would be effected by the transaction, may result in further displacements of employees. Clearly, however, it would not be in the public interest or compatible with the national transportation policy to deny the authority sought in order to prevent modernization of the Central's facilities and the possible losses of jobs incidental thereto. A freeze on progress in the railroad industry through technological improvements or otherwise, affords no solution to the problems of the industry or its employees.

In order that the hardships to employees may be alleviated, section 5(2)(f) makes it mandatory, if we approve the transaction, that we impose certain conditions for the protection of employees.[2] There is substantial difference

[2] Section 5(2)(f) provides:

"(f) As a condition of its approval, under this paragraph (2), of any transaction involving a carrier or carriers by railroad subject to the provisions of this part, the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected. In its order of approval the Commis-

of opinion between applicant and the association as to the conditions which should be imposed.

Both the applicant and the Central are signatories of the so-called Washington Agreement of May 21, 1936 (Washington Agreement), entered into between most of the major railroads and railway labor brotherhoods, which affords certain benefits to employees adversely affected by railroad coordinations. Applicant and the Central have agreed that we may impose conditions for the protection of adversely affected employees like those prescribed in *Chicago & N. W. Ry. Co. Merger*, 261 I.C.C. 672, or those imposed in *Oklahoma Ry. Co. Trustees Abandonment*, 257 I.C.C. 177, hereinafter referred to as the *North Western* and *Oklahoma* conditions, respectively. The conditions prescribed in the first cited case have been used only when it was not definitely shown that employees would be adversely affected and are inappropriate here.

The *Oklahoma* conditions, which have been prescribed in connection with many transactions approved under section 5(2), provide generally for full monetary compensation for wage losses by employees who may be placed in a worse position with respect to their employment during a period of 4 years from the effective date of the order of approval, or the length of service of the employee, whichever is lesser. Compensation also is provided for fringe benefits, necessary expenses of moving, and for losses suffered through the sale of homes at less than their fair

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sion shall include terms and conditions providing that during the period of four years from the effective date of such order such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment, except that the protection afforded to any employee pursuant to this sentence shall not be required to continue for a longer period, following the effective date of such order, than the period during which such employee was in the employ of such carrier or carriers prior to the effective date of such order."

value. In certain situations where it appeared that employees would not be affected for a substantial period after the effective date of the approval order, we have imposed so-called *New Orleans* conditions; i.e., those described in *New Orleans Union Passenger Terminal Case,* 282 I.C.C. 271.

In principal substance, the *New Orleans* conditions superimpose upon the *Oklahoma* conditions the provisions of the Washington Agreement, the protection afforded by the *Oklahoma* conditions to be applied as a minimum. The Washington Agreement affords benefits to employees for a maximum period of 5 years, depending upon the length of service, from the effective date of a coordination, but if an employee is displaced during the protective period he is entitled to an allowance equal to 60 percent, instead of 100 percent as under the *Oklahoma* conditions, of his average monthly compensation during the last 12 months of his employment. The *New Orleans* conditions were imposed for the specific purpose of giving protection to those employees who knowingly were not to be adversely affected in their employment until a substantial period elapsed after the date of the order authorizing the transaction and who otherwise would have received little or no protection under the *Oklahoma* conditions.

The applicant estimates that the cost to it and the Central of the *North Western* conditions would be $5,147,000 during the first year and slightly lesser amounts in each of the following 3 years, or a total of approximately $20,000,000 over a period of 4 years. This estimate is not supported by detailed data, and based upon our experience in similar situations, we are not willing to accept it as accurate. The $20,000,000 estimate is equivalent to a total of about $24,000, and an annual average for the 4 years of about $6,000, for each job eliminated. In our opinion, such estimate is grossly excessive and fails to take into full account the reduction in displacement allowances which would accrue from death, retirements, and compensation received by displaced employees from other employment,

et cetera. While the data of record does not permit a precise estimate of cost of the conditions which hereinafter will be imposed, we are satisfied that the cost will be greatly less than the indicated estimate of applicant and that, in view of the savings which will result through the reduction of forces made possible by the transaction, the conditions will not be unduly onerous and will not endanger the applicant's and the Central's ability to perform their common carrier obligations.

The Central has expressed willingness to reemploy any displaced employee affected by the transaction in his particular type of work, in the event of a vacancy or vacancies during the 4-year protective period, and the applicant has likewise expressed a willingness to fill vacancies it may have with affected employees of the Central who meet its requirements, and to assist other employees in obtaining employment in industries along its lines. Self-interest would dictate that the Central and the Southern give preference in employment to persons who may be displaced by the transaction, to minimize the cost of the labor conditions. In our opinion, such self-interest also dictates that they cooperate with and aid employees in obtaining retraining, when desired by them, for other occupations with the railroads or other industries.

The association argues for the imposition of so-called attrition conditions, under which, with minor exception, no employee of the carriers involved who was actively employed on the date of the filing of the application herein shall be deprived of employment or placed in a worse position with respect to compensation at any time during his employment because of the transaction or because of any program of economies resulting from a transaction. In view of the decision of the United States Supreme Court in *Maintenance Employees* v. *United States*, 366 U.S. 169 (1961), the association concedes that we are not required by the statute to impose such conditions, but contends that they should be imposed under the "fair and equitable" provision of the first sentence of section 5(2)(f). In *Erie*

R. Co. Merger, 312 I.C.C. 185, 196, wherein the association was urging the prescription of similar "attrition" conditions, it was stated:

> Assuming that we have the power to impose conditions like those requested by the association, in our opinion, such action would not be consistent with the public interest. Conditions calculated to preserve unneeded jobs would unduly restrict the applicants in the establishment of most economical operations, would be wasteful, and would be in conflict with the objectives of the national transportation policy, under which we are enjoined to promote economical and efficient service and to foster sound economic conditions in transportation and among the several carriers.
>
> A like conclusion is warranted here.[3]

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[3] In connection with this subject, it is noteworthy that the report of February 1962 of the Presidential Railroad Commission, appointed to consider and mediate certain specific issues between the major railroads and five brotherhoods representing operating employees, rejected a requirement of attrition as a means of protecting employees from the effect of technological changes. Among other things, the report states:

"This polite word, attrition, which means keeping all present employees, regardless of their usefulness, until the end of their working lives, conceals a number of vices.

"a. It means that many employees would devote their time and energy to tasks that need not be done. Such fruitless endeavor does not enhance the human personality. Its true objective is not to furnish employment but to furnish income to the employee whose skill has become superfluous and who has no opportunity for promotion or transfer to a useful task. It ought to be possible to achieve this legitimate end without degrading the employee.

"b. Attrition also means that the nation as a whole is deprived of useful service which potentially retrainable and productive employees coming under such a plan would otherwise render.

"c. Finaly, attrition is a slow process. The rate of technological change is now so rapid that attrition alone may not have digested one change before we are caught up in another."

It is our opinion that the protection afforded by the *New Orleans* conditions, modified in minor respects as hereinafter described, will more than meet the minimum requirements of section 5(2)(f) and will be fair and equitable to the employees and to the carriers involved in the transaction. In the past, these conditions have proved substantially acceptable to carriers and employees and have been upheld by the courts.

The association contends that certain "incidents" of employment are not adequately protected by the *Oklahoma* or *New Orleans* conditions. Specific reference is made to hospitalization, medical-surgical care, life insurance, and vacation rights. We do not agree. In our opinion, employees are fully and adequately protected with respect to these so-called incidents of employment, or fringe benefits, by paragraph 6 of the *Oklahoma* conditions, to which benefits an employee is entitled under the *New Orleans* conditions.[4]

The association seeks, and the examiner recommended, modification of paragraph 8 of the *Oklahoma* conditions, which sets forth procedures for the settlement of disputes. That provision contemplates arbitration of disputes with respect to claims arising by virtue of certain of the conditions. However, we are informed that carriers upon occasion have failed to acknowledge that a claimed adverse effect has resulted from a specific transaction and have

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[4] Paragraph 6 of the *Oklahoma* conditions and paragraph 6, article I of the conditions herein prescribed provide: "No employee affected by the transaction approved herein shall be deprived during the protective period of benefits attached to his previous employment, such as free transportation, pensions, hospitalization, relief, et cetera, under conditions and so long as such benefits continue to be accorded to other employees on his home road, in active service or on furlough, as the case may be, to the extent that such benefits can be so maintained under present authority of law or corporate action or through future authorization which may be obtained."

refused to submit the matter for arbitration, thus forcing an employee claimant into expensive court proceedings. The possibility also exists that a carrier will refuse to accept arbitration procedures under paragraph 8 and require employees to invoke the provisions of section 13 of the Washington Agreement, which involves a permanent committee whose decisions may be subject to protracted delay after a claim is made. In our opinion, fairness and equity require adoption with some modification, as hereinafter set forth, of the condition urged by the association with respect to arbitration, which will make mandatory the submission to binding arbitration of disputes not settled by agreement between the carrier and the employee. However, we are unwilling to adopt that portion of the condition suggested by the association providing that—

> the employees shall have the burden of establishing a *prima facie* case. The carrier then shall have the burden of proving that the employee was affected as the result of circumstances unconnected with the transaction.

In our opinion, such provision is unnecessary and would make more complicated, rather than simplify, the task of an arbitration committee. An arbitration committee is not bound by strict rules of evidence, and we are of the view that the procedure to be followed by it, in arriving at a just conclusion as to the merits of a particular claim, may be left to its determination in the light of the circumstances surrounding the claim in dispute. It may call upon either party to produce relevant data within such party's knowledge or possession.

The association further contends that conditions should be imposed for the protection of employees of the Frisco who may be adversely affected by the proposed transaction. The evidence is in conflict concerning whether any of the Frisco's employees will actually be affected by the trans-

action, and, if so, whether such effect can be determined as solely due thereto. The Frisco denies that any of its employees will be so affected.

The Frisco's East Thomas Yard employees are not employees of the applicant or the Central and are not subject to their control, but, on the contrary, are hired, paid, supervised, and controlled by the Frisco, on whose seniority rosters they are intermingled, and have interchangeable assignments, with other Frisco employees whose duties have nothing to do with the yard operations. The Frisco is an entirely separate legal entity and not the *alter ego* of the applicant. The Central can unilaterally withdraw from the Frisco's yard at any time on 6 month's notice whether or not the transaction is approved. The Illinois Central also uses the Frisco yard and it is doubtful that any effect of the transaction upon the Frisco's employees could be separated from such use or from the effects of changes in traffic patterns, business declines, changes in train schedules, or technological improvements.

The Frisco is a party to the transaction only in the capacity of a beneficial owner of the Central stock, and the transaction will not unify ownership or control of its railroad operations with those of any other carrier. We find that employees of the Frisco are not employees which will be affected by our order within the meaning of section 5(2)(f) and that we are not required to impose conditions for their protection. The situation in regard to these employees is similar to that presented in Finance Docket No. 18534, *Spartanburg Term. Co. Construction*, 295 I.C.C. 806 (not printed in full), decided July 10, 1957, wherein we held that the act does not require the imposition of conditions for the protection of employees of a carrier neither an applicant nor involved in the transaction within the meaning of the statute. See also *Baltimore & O. R. Co. Operation*, 261 I.C.C. 615, *Seaboard Air Line R. Co. Control*, 312 I.C.C. 507.

Assuming that we have the power to impose conditions for the protection of employees of carriers not directly involved in a transaction before us, in our opinion, it would be inequitable and contrary to the public interest for us to do so in situations like that presented here. It is just that the cost of a reasonable plan for the protection of employees of carriers participating in a unification be a charge against the savings obtainable from the unification. However, aside from the impracticability of determining whether a transaction is the proximate cause of claimed injurious effects sustained by employees of other carriers, it would be unjust and, unreasonable, would discourage unifications in the public interest, and would stifle normal competition if the participants in a transaction were required to indemnify employees of competing carriers from possible adverse effects suffered by reason of losses of busines by their employer.

Applicant takes the position that none of the conditions imposed should afford benefits to employees who may be adversely affected subsequent to the acquisition of control by reason of internal technological improvements and economies effected by the Central. It requests that we expressly hold that the labor conditions prescribed do not apply to employees so affected. This request must be denied. If we approve the transaction, we are required by section 5(2)(f) to include terms and conditions providing that, for a prescribed period, the "transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment." In conformity therewith, conditions heretofore prescribed by us and those which will be prescribed herein protect an employee "if as a result of" the particular transaction he is adversely affected in his employment. We may not by interpretation narrow the scope of the protection intended by the statute. Both the statute and the condition mean what is literally stated; i.e., that an employee is protected against adverse effects

suffered in his employment as a result of the transaction. Questions as to whether adverse effects suffered by particular employees in their employment result from the transaction are questions of fact which can be determined under the circumstances of particular cases and must be left for the determination of the arbitrators in case of dispute.

We find that a fair and equitable arrangement for protecting the interests of the employees of the applicant and the Central and any of its subsidiaries who may be adversely affected as a result of the transaction herein approved will be provided by imposing the conditions set forth in appendix II hereof. These conditions conform substantially to the *New Orleans* conditions, with a modification, as hereinbefore indicated, in the provision respecting arbitration of disputes.

General discussion and conclusions.

* * * * * * * * * *

Subject to

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(*b*) the conditions for the protection of employees set forth in appendix II hereof,

* * * * * * * * * *

APPENDIX II

Conditions for the benefit of employees of carriers

ARTICLE I

1. *Definitions.*—Whenever used in this article, unless the context requires otherwise, the words and phrases defined in this paragraph shall be deemed and construed to have the meanings herein set forth.

(*a*) "Transaction" means the transaction or transactions approved by the report of which this appendix is a part.

(*b*) "Carrier" means the railroad or railroads which are involved in the transaction, as defined or described in the said report.

(*c*) "Displaced employee" means an employee of a carrier who is placed in a worse position with respect to his compensation and rules governing his working conditions as a result of the transaction.

(*d*) "Dismissed employee" means an employee of a carrier who, as a result of the transaction, is deprived of employment with the carrier because of the abolition of his job or the loss thereof as the result of the exercise of seniority rights by an employee whose position is abolished as a result of the transaction.

(*e*) "Protective period" means that period of time from the date on which an employee is displaced or dismissed to the expiration of 4 years from the effective date of the order authorizing the transaction; provided, however, that the protective period for any particular employee shall not continue for a longer period following the effective date of said order than the period during which such employee was in the employ of the carrier prior to the effective date of the order.

2. *Displacement allowances.*—(*a*) So long after his displacement as he is unable, in the exercise of his seniority rights under existing agreements, rules, and practices, to obtain a position producing compensation equal to or exceeding the compensation he received in the position from which he was displaced, during the protective period a displaced employee shall be paid a monthly displacement allowance equal to the difference between the monthly compensation received by him in the position in which he is retained and the monthly compensation received by him in the position from which he was displaced; provided, however, that if any employee elects not to exercise his seniority rights he shall be entitled to no allowance.

(*b*) Each displacement allowance shall be determined by dividing separately by 12 the total compensation received by the employee and the total time for which he was paid during the last 12 months in which he performed services immediately preceding the date of his displacement as a result of the transaction, thereby producing average monthly compensation and average monthly time paid for in the test period.

(*c*) If his compensation in his retained position in any month is less than the aforesaid average compensation, the displaced employee shall be paid the difference, less compensation at the rate of the position from which he was displaced for time lost on account of his voluntary absences in his current or retained position, but if in his retained position he works in any month in excess of the average monthly time paid for in the test period, he shall be compensated for the excess time at the rate of pay of the retained position.

(*d*) Nothing herein contained shall operate to affect in any respect the retirement on pension or annuity rights and privileges with respect to any employee.

3. *Dismissal allowances.*—(*a*) A dismissed employee shall be paid a monthly dismissal allowance, from the date he is deprived of employment and continuing during the protective period, equivalent to one-twelfth of the compensation received by him in the last 12 months of his employment in which he earned compensation prior to the date he is first deprived of employment as a result of the transaction.

(*b*) The dismissal allowance of any dismissed employee who is otherwise employed shall be reduced to the extent that his combined monthly earnings in such other employment, any benefits received under any unemployment insurance law, and his dismissal allowance exceed the amount upon which his dismissal allowance is based. Such employee, or his representative, and the carriers, shall agree

upon a procedure by which the carriers shall be currently informed of the wages earned by such employee in employment other than with the carriers, and of the benefits received.

(c) The dismissal allowance shall cease prior to the expiration of the protective period in the event of the failure of the employee without good cause to return to service after being notified by the carriers of a position, the duties of which he is qualified to perform and for which he is eligible, or in the event of his resignation, death, retirement on pension, or dismissal for good cause.

4. *Fringe benefits.*—No employee of the carrier who is affected by the transaction shall be deprived during the protective period of benefits attached to his previous employment, such as free transportation, hospitalization, pensions, relief, et cetera, under the same conditions and so long as such benefits continue to be accorded to other employees on his home road, in active service, or on furlough, as the case may be, to the extent that such benefits can be so maintained under present authority of law or corporate action or through future authorization which may be obtained.

5. *Moving expenses.*—Any employee retained in the service of the carrier or who is later restored to service after being entitled to receive a dismissal allowance, and who is required to change the point of his employment as a result of the transaction, and within the protective period is required to move his place of residence, shall be reimbursed for all expenses of moving his household and other personal effects, for the traveling expenses of himself and his immediate family, and for his own actual wage loss, not to exceed 2 days, the exact extent of the responsibility of the carrier to be agreed upon in advance by the carrier and the employee affected; provided, however, that changes in place of residence which are not a direct result of the transaction, made subsequent to the initial change and

which grow out of the normal exercise of seniority, shall not be considered within the purview of this paragraph.

6. *Arbitration of disputes.*—In the event any dispute or controversy arises with respect to the protection afforded by these conditions or with respect to their interpretation, application, or enforcement, which cannot be settled by the carriers and the employee or his authorized representatives within 30 days after the dispute arises, it may be referred by either party to an arbitration committee for consideration and determination. Upon notice in writing served by one party o nthe other of intent by that party to refer the dispute or controversy to an arbitration committee, each party shall, within 10 days, select one member of the arbitration committee and the two members thus chosen shall select a third member who shall serve as chairman. Should the two members be unable to agree upon the appointment of the third member within 10 days, the parties shall then within an additional 10 days endeavor to agree to a method by which a third, or neutral, member shall be appointed, and, failing such agreement, either party may request the National Mediation Board to designate the third member, which designation when made will be binding upon the parties. The decision of the majority of the arbitration committee shall be final, binding, and conclusive. The salaries and expenses of the third member shall be borne equally by the parties to the proceeding and all other expenses shall be paid by the party incurring them.

7. *Losses from home removal.*—(*a*) The following condition shall apply, to the extent it is applicable in each instance, to any employee who is retained in the service of any of the carriers (or who is later restored to service after being entitled to r ceive a dismissal allowance), who is required to change the point of his employment within the protective period as a result of the transaction and is therefore required to move his place of residence:

(*i*) If the employee owns his own home in the locality from which he is required to move, he shall at his option be reimbursed by his employing carrier for any loss suffered in the sale of his home for less than its fair value. In each case the fair value of the home in question shall be determined as of a date sufficiently prior to the date of filing of the application or applications here involved so as to be unaffected by such filing. The employing carrier shall in each instance be afforded an opportunity to purchase the home at such fair value before it is sold by the employee to any other person.

(*ii*) If the employee is under a contract to purchase his home, the employing carrier shall protect him against loss to the extent of the fair value of any equity he may have in the home and in addition shall relieve him from any further obligation under his contract.

(*iii*) If the employee holds an unexpired lease of a dwelling occuiped by him as his home, the employing carrier shall protect him from all loss and cost in securing the cancellation of his said lease.

(*b*) Changes in place of residence subsequent to an initial change caused by the consummation of the transaction and which grow out of the normal exercise of seniority in accordance with working agreements are not comprehended within the provisions of this condition.

(*c*) No claim for loss shall be paid under the provisions of this condition which is not presented within 1 year after the date the employee is required to move.

(*d*) Should a controversy arise with respect to the value of the home, the loss sustained in its sale, the loss under a contract for purchase, loss and cost in securing termination of a lease, or any other question in connection with these matters, it shall be decided through joint conference between the representatives of the employees and the car-

rier on whose line the controversy arises and in the event they are unable to agree, the dispute or controversy may be referred by either party to a board of three competent real estate appraisers, selected in the following manner: One to be selected by the representatives of the employees and one by the carrier, and these two shall endeavor by agreement within 10 days after their appointment to select the third appraiser. A decision of a majority of the appraisers shall be required and said decision shall be final and conclusive. The salary and expenses of the third or neutral appraiser, including the expenses of the appraisal board, shall be borne equally by the parties to the proceedings. All other expenses shall be paid by the party incurring them, including the compensation of the appraiser selected by such party.

ARTICLE II

1. Any employee adversely affected as a result of the transaction, within 4 years from the effective date of the order approving the transaction, shall receive as a minimum the protection afforded by article I hereof for the period he is adversely affected prior to the expiration of 4 years from the effective date of the order of approval, and any such employee so adversely affected who has received under such conditions total dismissal or displacement compensation less than that which he would receive by applying the Washington Agreement of May 21, 1936, as limited by paragraph 2 of this article, for the full protective period therein provided from the time he is first adversely affected, shall continue to receive benefits under the terms of the Washington Agreement, as limited, until the total compensatory benefits provided therein for the particular period of service have been paid.

2. In applying the Washington Agreement the coordination allowance provided therein for dismissed employees shall be reduced with respect to any employee who is other-

wise employed to the extent that his combined monthly earnings in such other employment, any benefits received under any unemployment insurance law, and his coordination allowance, exceed the amount upon which his coordination allowance is based; such employee or his representative, and the carriers, to agree upon a procedure by which the carriers shall be currently informed of the wages earned by such employee in employment other than with the carriers, and the benefits received.

3. Any dispute or controversy which may arise with resepect to the additional benefits provided by this article II shall be settled in the same manner as provided in paragraph 6 of article I hereof in relation to disputes arising under the latter article.

APPENDIX D

INTERSTATE COMMERCE COMMISSION

Finance Docket No. 21400

SOUTHERN RAILWAY COMPANY—CONTROL—CENTRAL OF GEORGIA RAILWAY COMPANY

Decided June 10, 1963

Upon reconsideration, conditions set forth in the prior report, 317 I.C.C. 557, for the benefit of employees of the carriers involved, clarified.

Appearances as shown in prior report.

REPORT OF THE COMMISSION ON RECONSIDERATION

BY THE COMMISSION:

Our report of November 7, 1962, 317 I.C.C. 557, found that, subject to certain conditions, acquisition by the applicant Southern Railway Company of control of Central of Georgia Railway Company (Central) through ownership of its capital stock and, through that carrier, of indirect control of its carrier subsidiaries, would be consistent with the public interest and should be approved and authorized. On December 3, 1962, we entered an order to carry out the intent of that report and modified the findings of the prior report in particulars not here pertinent. That order became effective January 9, 1963.

A petition for reconsideration of the aforementioned report and order was filed by the Railway Labor Executives' Association (association), and the applicant and the Central jointly filed a petition for further consideration and clarification of the conditions imposed for the benefit of employees. Applicant and the Central and the

St. Louis-San Francisco Railway Company replied to the petition of the association, and it replied to the joint petition of applicant and the Central. By our order of April 30, 1963, we reopened this proceeding for reconsideration of such conditions.

The petition of the association sets forth no material facts or arguments not heretofore considered and discussed by us in the prior report. We perceive no error of fact or law with respect to the matters complained of by it, and, accordingly, the petition of the association will be denied except to the extent heretofore granted by reopening of the proceeding for reconsideration.

Applicant and the Central, hereinafter collectively referred to as the affected carriers, request that we further consider and clarify the employee conditions and related discussion in our prior report and eliminate alleged ambiguities which, they state, create risks for both railroads too great to permit consummation of the subject transaction.

The affected carriers object particularly to the provisions contained in paragraph 6, article I, of the conditions with respect to the arbitration of disputes arising under the conditions, and many of the other questions raised by them display an apparent mistrust of such procedure. For many years, labor conditions imposed by us in section 5(2) proceedings have included a provision for arbitration of disputes not settled by agreement between the carriers and affected employees. The arbitration provision imposed herein differs from previous provisions or further elucidation herein as to the intent of the con- has been found to be implicit in the previously imposed provision; i.e., the obligation of either party to a dispute to submit to arbitration when the other elects to follow such procedure. The railroad industry generally has accepted arbitration as a reasonable method for settling disputes of this nature, and we are not apprised of any

situation where this has resulted in harassment or injustices to the railroads as apparently is envisaged by the carrier petitioners. For reasons generally set forth in the prior report, we are of the view that no modification should be made in the arbitration provision set forth in appendix II of our prior report.

In their petition the affected carriers have conjured up unwarranted specters of dire results which could flow from application of the labor conditions, and have asked that we answer various questions as to our intent with respect thereto. Some of the illustrations given obviously present questions which could be settled only by consideration of all pertinent facts surrounding an employee's dismissal or displacement and which are not susceptible of abstract determination in advance. Questions of this nature raised by the petition have been considered by us but, in our opinion, do not require separate and detailed discussion or further elucidation herein as to the intent of the conditions imposed.

There is merit in the affected carriers' plea that, for the guidance of abritrators, we clarify our intention as to the general scope of the protection intended to be afforded. We will attempt to do this by reference to certain of the questions raised.

The carriers state that the prior report fails to face up to the most crucial question of whether remote, indirect, secondary, or insubstantial connections with the transaction are sufficient to bring employment conditions within the "results" which would entitle "employees cut off for other reasons to the protective conditions imposed." Obviously, if an employee is dismissed or displaced for reasons not connected with the transaction, he is not entitled to the benefit of the conditions. Before an employee is entitled to such benefits, there must be a reasonably direct causal relation between the transaction and the injury

sustained; in other words, the transaction must be the proximate cause of the injury.

It is definitely our intention that the protection afforded by the conditions shall be available to all employees dismissed or displaced as a result of a chain reaction resulting from the exercise of seniority rights by an employee whose job is abolished or whose work is transferred from the Central to the Southern. Such "secondary" results are within the scope of the conditions.

The affected carriers point to the fact that applicant presently is free to construct an automatic car retarder yard at St. Louis, Mo., or Macon, Ga., without danger of any liability to employees whose work thereby becomes unnecessary, and it asks questions substantially as follows:

1. Is it our intent that applicant, if it consummates the transaction, must agree in advance to submit to the risk of binding arbitration claims by all its employees who lose their jobs because of such construction, despite the fact that the evidence herein showed, and the examiner found, that only four of applicant's employees would lose their jobs as a result of the transaction?

2. Would an allegation that the construction was the "result" of the transaction be sufficient to require applicant to submit to such arbitration?

3. Is it our intent that mere proof that the acquisition had increased applicant's net revenues, thereby indirectly contributing some small part of the funds for the construction, permit an arbitration board to find that employees adversely affected by the construction were entitled to the protective conditions?

4. Is it the intent of the conditions that, once the transaction has been consummated, all internal management decisions by applicant—e.g., replacement of worn-out heavily-maintained equipment with new maintenance-free equipment, or replacement of small capacity equipment, etc.—

must be made in the face of the possibility that an arbitration board might determine that any employees affected by such changes would be entitled to protection under the conditions imposed?

As to the first two questions, it is plain under the conditions that, if a dispute arises betwen applicant and an employee as to whether a laimed injury resulted from the transaction and, if the employee elects to follow such procedure, applicant will be bound to submit the matter to arbitration. A board of arbitrators can fairly decide the issue presented, although with respect to the illustration giving with respect to the yard in St. Louis we cannot conceive that an employee would be successful. In view of the provisions for the sharing of expenses, we consider that applicant is unduly apprehensive with respect to the prosecution by employees of unmeritorious claims. In the absence of an arbitration provision, applicant, of course, would be subject to civi. actions in the courts, which could prove more burdensome and expensive to all parties concerned.

Question No. 3 is answered in the negative. As to No. 4, it is true that management decisions must be made with a consciousness of the conditions imposed, and applicant will be bound to submit to arbitration disputes as to whether a dismissal or displacement has resulted from the transaction. However, here again, it appears that applicant is unjustifiably mistrustfu. of the ability of an arbitration board to render a fair decision. Certainly, it is not our intention that changes like those referred to in this question would give rise to a valid claim under the conditions.

The petition of the affected carriers refers to findings in the prior report that the transaction will aid in strengthening the Central and providing it greater financial stability, and that future technological improvements made possible by increased earnings as a result of the economies

which would be effected by the transaction may result in further displacement of employees. Assuming that the transaction results in coordination economies, that "these essential economies, along with other factors, contribute to gradual improvement in the earnings and financial strength of the Central," and that this improved financial condition permits the Central to effect overdue and essential economies with resulting adverse effects on Central employees, the petition inquires whether under such circumstances it is our intent in the conditions to permit every employee who is adversely affected in his employment by the last link in this chain of events to demand arbitration and to permit an arbitration board to burden the Central with payments to such employees.

It is plain under the conditions that an employee would be entitled to benefits if adversely affected by a coordination of the operations of applicant and the Central or by the shifting of functions from one to the other. However, the effect of subsequent internal technological improvements by either of the carriers, even if made possible by improved financial circumstances partly attributable to the unification of control, is too indirect and remote to be considered a result of the transaction; and it is not our intention that employees affected by such internal improvements shall be entitled to the benefit of the conditions.

The affected carriers assert that there is a need for clarification with respect to "persons holding no job with either of them on the date of consummation." The conditions, as to the provisions of section 5(e)(f), apply only to "employees" of the applicant and the Central. However, they are not limited in their application to persons who may be in a pay status on the date the transaction is consummated. If a person possesses the status of employee of either carrier when the transaction is consummated, he is entitled to the protection afforded by the conditions, provided he demonstrates that he has been deprived of em-

ployment or displaced as a result of or in anticipation of the transaction. If such showing were made, the amount of compensation would depend upon his average monthly earnings in the 12 months preceding his displacement or dismissal.

The affected carriers contend that, unlike the situation in *New Orleans Union Passenger Terminal Case*, 282 I.C.C. 271, the subject transaction would be consummated promptly, the proposed coordinations would involve no substantial delay nor significant construction of facilities, and adversely affected employees would be affected almost immediately, and that, therefore, circumstances justifying the *New Orleans* conditions (incorporated in substance in article II of the conditions herein imposed) are absent. We cannot be assured that the transaction will be consummated promptly—litigation or other events may delay such consummation—or that all coordinations will be effected immediately after consummation. More than 4 months already have elapsed since the effective date of our order.

In our opinion, the method prescribed for the computation of dismissal and displacement allowances needs no clarification and we perceive no ambiguities, as alleged by the petitioners, with respect to the period during which employees are entitled to protection under either article I or article II. The latter affords substantially the same protection (subject to the limitation set forth in paragraph 2 of that article) given by the Washington Agreement of May 21 1936, to which the affected carriers are signatories.

Questions raised by the petition as to whether dismissed employees may exercise seniority rights are beyond the scope of the conditions. Such matter, doubtless, is covered by the collective bargaining agreements entered into by carriers and labor unions.

We are satisfied that the conditions set forth in our prior report are just and reasonable and constitute a fair and equitable arrangement to protect the interests of the rail-

road employees who may be adversely affected as a result of the transaction. No modification of the language of those conditions is deemed necessary, but they should be construed by affected parties and arbitrators in the light of our foregoing remarks.

We find that our prior order should be affirmed and that, except to the extent granted by reconsideration and clarification of the intent of the conditions set forth in appendix II of our prior report, the petitions of the Railway Labor Executives' Association and of the applicant and Central of Georgia Railway Company should be denied.

An appropriate order will be entered.

COMMISSIONER HUTCHINSON concurs in the result.

COMMISSIONER WEBB, dissenting:

The report is intended to clarify the employee protective conditions imposed by the prior report. In my opinion, the purpose and effect of the conditions have been so befogged that the befuddlement of all concerned could not be made more complete.

A threshold requirement in this proceeding is to identify the subject matter to be submitted to arbitration. This identification is crucial because the decision of the arbitration tribunal on all disputed factual and legal issues within the scope of the submission is final, binding, and conclusive. The submission, in other words, determines the jurisdiction of the arbitration board and reserves for ordinary legal processes the settlement of all controversies not submitted to arbitration.

I am now satisfied that the prior report erred in submitting unreservedly to arbitration all disputed questions of fact and law arising under the involved employee protective conditions. Nevertheless, the prior report was perfectly clear. It held, in effect, that an employee must be protected against all adverse effects suffered "as a result of" a section 5(2) transaction and that all such allegations

present purely factual questions which "must be left for the determination of the arbitrators in case of dispute." In other words, the protection accorded by section 5(2)(f) and the implementing conditions was found to be coextensive with whatever conclusion might be reached by arbitration boards in particular cases.

Some of the confusion manifested in the instant report appears to have been generated by the applicant's petition for clarification of the Commission's "intent." However, no expression of Commission intent can eliminate the potential liability feared by applicant unless that intent is effectuated by delimiting in the submission to arbitration the jurisdiction of the boards. Whether or not any jurisdictional limitation respecting internal technological improvements is proper depends essentially on a legal interpretation of section 5(2)(f) which applicant professes not to be seeking.

To compound the confusion, applicant draws an analogy between a judge instructing a jury and the Commission instructing arbitrators in the matter of determining whether a particular displacement or dismissal is "a result of" a section 5(2) transaction. One of the obvious differences is that judges instruct juries on the basis of concrete evidence heard by both. However, if a matter is submitted to arbitration, it is improper for the Commission to attempt to sway the board's evaluation of the evidence by abstract predeterminations of factual issues, and it would be no less improper for the board to surrender the independent judgment it is expected to exercise. Applicant's courtroom analogy is apposite only in the sense that a court may direct a verdict for one party as a matter of law, just as the Commission here, in my opinion, should determine as a matter of law that certain adverse effects attributable to internal technological improvements create no liability under section 5(2)(f). Of course, that kind of analogy requires an interpretation of section 5(2)(f) which the applicant does not seek.

Centrally in issue in this proceeding is the following question of law: Are internal technological improvements made by either of the carriers involved in a section 5(2) transaction, and which adversely affect the employees of either, too indirect and too remote as a matter of law to be considered as a result of the transaction? This is a close question but it can be answered categorically. My answer is, "yes." The majority's answer is as follows:

> However, the effect of subsequent internal technological improvements * * * is too indirect and remote to be considered a result of the transaction; and it is not our intention that employees affected by such internal improvements shall be entitled to the benefit of the conditions.

If the first part of the sentence excludes the subject from the submission to arbitration, the majority's conclusion is apparently the same as mine. In that case, the second part of the sentence quoted above is superfluous. If it is not superfluous, the majority's "intention" appears to be a mere hope or expectation that arbitration boards will reach the indicated conclusion. The latter interpretation is supported by the answers given earlier in the report to four questions posed by the applicant.

In responding to questions 1 and 2, the report concludes in effect, that allegations of injury claimed to result from internal technological improvements, which allegedly result in turn from the transaction, must be submitted to arbitration. This would appear to be required no matter how frivolous the claim in the light of the majority's general expressions of intent. In answering question 3, however, the majority finds that an arbitration board would not be permitted to approve certain claims, notwithstanding the fact that the board's legal and factual conclusions on the matters submitted to arbitration are final and conclusive. Evidently, the majority has some doubt about the

answer given to question 3, because the general concern expressed in question 4 is dismissed with the *ipse dixit* that arbitration boards can be trusted to reach fair decisions.

These opposing ideas cannot be reconciled by sprinkling comments throughout the report to the effect that the applicant is unjustifiably mistrustful of arbitration. In my opinion, applicant has just cause to be concerned about the decisions that might be rendered by unknown arbitrators on a novel class of claims and determined in the final analysis on the basis of varying and fluid concepts of proximate cause. In any event, the potential liability created by the report is so large in relation to the reasonably foreseeable benefits to be derived from the acquisition of control that applicant should not be compelled to gamble on the possibility that ambiguities in the report ultimately will be resolved in its favor.

Whether or not an employee is adversely affected as a result of a section 5(2) transaction is a mixed question of law and fact. The economies resulting from coordination of railroad operations, for example, are attainable only through Commission approval of a section 5(2) transaction and thus differ in kind from the savings derived from internal technological improvements. The prior report had the practical effect of drowning all the pertinent questions of law embodied in section 5(2)(f) in a sea of fact navigable only by arbitrators. Contrary to that conclusion, I am satisfied that there is room in section 5(2)(f) for the doctrine of *damnum absque injuria*. If there is not, section 5(2)(f) reincarnates the economic philosophy of the Luddites who went about early in the last century destroying the textile machinery designed to increase their productivity. Before attributing to the Congress the Luddite aversion to technological progress, I should like to be advised by some appropriate higher authority that there is no alternative.

COMMISSIONER TUGGLE did not participate.

APPENDIX E

INTERSTATE COMMERCE COMMISSION

Finance Docket No. 21400

SOUTHERN RAILWAY COMPANY—CONTROL—
CENTRAL OF GEORGIA RAILWAY COMPANY

Decided February 17, 1964

Conditions for the benefit of employees of the carriers involved further clarified. Prior reports, 317 I.C.C. 557 and 729.

Appearances as shown in prior reports.

SUPPLEMENTAL REPORT AND ORDER OF THE COMMISSION

BY THE COMMISSION:

On January 31, 1964, a three-judge court (the United States District Court for the Eastern District of Virginia) rendered its decision in *Railway Labor Executives' Association, et al. v. United States, et al.*, Civil Action No. 3004, sustaining the Commission's order in this proceeding authorizing the Southern Railway Company to acquire control through stock ownership of the Central of Georgia Railway Company, subject to conditions *inter alia*, for the protection of employees. The order became effective January 9, 1963.

Subsequent to the decision of the three-judge court, it came to the Commission's attention that counsel for the parties, including the Commission, had urged or acquiesced in certain interpretations of the conditions for the protection of employees which are not in accord with the Com-

mission's intent and purpose in prescribing them. Accordingly, we find it necessary, in fairness to all concerned, to clarify the situation.

It was and is our intention that the protection afforded the affected employees is not limited to the protection set forth in Appendix II, but that, as we stated in the first report, the protection afforded by the *New Orleans* conditions will be fair and equitable. 317 I.C.C. at 565-66. We thereby incorporated all the provisions of the *New Orleans* conditions, which embraced the provisions of the Washington Agreement, except as specifically modified in Appendix II.

It was our finding that employees adversely affected by the transaction in this proceeding were to be afforded the protection of all provisions of the Washington Agreement of May 21, 1936, which were not specifically modified by the provisions set forth in Appendix II of our original report (317 I.C.C. at 588 *et seq.*).

The Washington Agreement was negotiated by collective bargaining between the contracting parties and, except as we have specifically done so (as, for example, section 2 of Article II of Appendix II to our original report in this proceeding) we have not in this or any prior proceeding superseded in any way that Agreement as a private contract. It follows that after January 9, 1967, when the protection under the conditions of Appendix II ends, the terms of the Washington Agreement, if applicable, shall continue, since the labor protective conditions which we have prescribed in this proceeding do not supersede the Washington Agreement as a private contract.

The foregoing clarification of the labor protective conditions prescribed in our original report in this proceeding is equally applicable to subsequent orders issued under Section 5 of the Interstate Commerce Act in which we

have prescribed by reference the same labor protective conditions.

We affirm the prior findings, as clarified.

An appropriate order will be entered.

COMMISSIONER FREAS, dissenting:

My objections to the report are three in nature. Initially, I must take issue with its lack of clarity. The report fails to list in detail the exact scope of protection to be accorded. It is inexplicably left to the contesting parties to determine which provisions of the Washington Agreement are not specifically inconsistent with the provisions in the original report. In this regard, if the past is a guide, the parties are unlikely to reach a satisfactory accord. In addition, the statement that the labor conditions do not supersede the Washington Agreement as a private contract lacks precision. Whether this is a statement of law or of fact is not clear. If the latter is intended, no analysis supporting the conclusion has been made. If the former is intended, in my opinion, assuming the conditions imposed to be appropriate (and I do not), they serve as a minimum standard only.

Secondly, and most important, I do not join in the extensive additional largess accorded here. In my opinion, the generous labor conditions imposed heretofore were correctly construed by the court and, as it found, adequately meet the standards of section 5(2)(f). The majority sets forth here an asserted intent and purpose. It is questionable whether such uncommunicated thoughts can now govern over the specificity manifest to the court. Indeed, the majority's action in reaching a result different from the court, on the same record, may well be open to legal doubt; as to the res judicata effect of a court judgment with respect to an agency's prior determination, see *State Comm'n* v. *Wichita Gas Co.*, 290 U.S. 564 (1934), *Grubb* v. *Public Utilities Comm'n*, 281 U.S. 470 (1930), and

Detroit & M. Ry. Co. v. *Michigan R. R. Comm'n*, 235 U.S. 402 (1914). In any event, there are lacking here the adequate findings and analysis of the record necessary to justify the position now taken. That such requirements are part of our decision-making process was forcefully brought again to our attention as recently as January 31, 1964, in *The Atchison, Topeka and Santa Fe Railway Co.* v. *United States*, —— F. Supp. ——, (C.A. No. 7826, D. Colo.), citing *Burlington Truck Lines* v. *United States*, 371 U.S. 156, 168 (1962). See also *Interstate Commerce Commission* v. *New York, N. H. & H. R. Co.*, 372 U.S. 744, 762-763 (1963); *Gilbertville Trucking Co.* v. *United States*, 371 U.S. 115, 130-131 (1962).

Thirdly, the supposed clarification here is made applicable to subsequent orders issued under section 5, presumably to such proceedings as Finance Docket No. 21215, *Seaboard Air Line Railroad Company—Merger—Atlantic Coast Line Railroad Company*, and to Finance Docket No. 21160, *Chesapeake & Ohio Railway Company—Control—Baltimore & Ohio Railroad Company* (already affirmed by the Supreme Court). I take objection to such retroactive action. *Cf. E. Brooke Matlack, Inc.* v. *United States*, 119 F. Supp. 617 (E. D. Pa. 1954). To the extent that a similar issue may be present in other proceedings, it should be determined on the records therein.

COMMISSIONER TUCKER, whom VICE-CHAIRMAN WEBB joins, dissenting:

In my opinion the effect of this supplemental report of the Commission is to take language from our original report, 317 I.C.C. 557, at 565-6, which reads:

> "It is our opinion that the protection afforded by the New Orleans conditions, modified in minor respects as hereinafter described, will more than meet the minimum requirements of section 5(2)(f) and will be fair and equitable to the employees and to the carriers involved in the transaction."

and to attempt to give it the status of a finding that employees adversely affected must be given the protection of all provisions of the *Washington Agreement* [embraced in the New Orleans conditions] which were not modified in Appendix II (317 I.C.C., at 588 et seq.)

Conceding that the Commission factually intended to incorporate the Washington Agreement to the extent not specifically modified in the labor conditions imposed, as I see it we must look at the findings made; not the findings intended. The binding statutorily required findings to the extent they impose labor conditions, are specified, at 317 I.C.C. 557, at 570, in these words:

> "[Subject to]—the conditions for the protection of employees set forth in Appendix II hereof"

These words, in my opinion, unequivocally and unambiguously can only be construed to say that all of the labor conditions appear in Appendix II.

In other words the Commission authorized the Southern Railway to acquire control of the Central of Georgia subject to the labor conditions of Appendix II. I find no authority or basis for us at this time to make new findings. It is now a question for others as to whether, as a matter of law, those conditions set forth in Appendix II do embrace all provisions of the Washington Agreement which are not specifically modified. For us gratuitously, in an *ex parte* expression, to bolster the Appendix with a view to influencing its interpretation is to interfere with the private rights and the private litigation of those affected by our findings.

At this point, certain carriers have undoubtedly taken action involving the commitment of expenditures and property based on the language of our findings; employees have presumably made and settled claims thereunder or have undertaken legal actions based thereon; and in one case, at least, all of the parties (including this Commission) submitted their case to a reviewing United States Court in

agreement that the labor conditions were literally set forth in Appendix II and, thus, that the appendix should be read as self-contained. Plainly that appendix itself must be read for its meaning and, if it is unambiguous, its meaning must come from within the four corners of the appendix. What I think actually is involved here is the integrity of Commission findings.

Indeed, judicial interpretation of a Commission report binds both the parties and the Commission, subject only to the Commission's power, in appropriate circumstances, to modify its report. Inasmuch as the majority denies that the supplemental report is a modification of the prior report, the majority at least appears to overrule the decision of the three-judge court for the Eastern District of Virginia. It seems to do so in the belief that considerations of "fairness" justify the expression of subjective intentions of afterthoughts not revealed in the prior report. In my opinion, due process requires administrative agencies to give "full faith and credit" to judicial interpretations of their reports.

Our findings concerning labor conditions was a condition precedent to approval and, in turn, the applicant's commitment to consummate. Our intention, which admittedly was to incorporate the Washington Agreement to the extent not specifically modified, is of importance only to the extent that others find ambiguity in our ultimate finding. Our stated opinion, quoted above from our prior report, is expressed in a form of language equally appropriate to many equitable possibilities—whether subsequently to be imposed or not by our findings. Characterizing our "intention" as a "finding" at this late date does not make it a finding. It is what we did, not what we intended to do, that has legal consequence.

The question of what *private* rights and duties under the Washington Agreement affect the carriers involved here and their employees, independent of the transaction approved and authorized by this Commission, is certainly

a matter for private litigation and the proper forum for such litigation is not the Interstate Commerce Commission.

Whether this case could be reopened by us to review the labor conditions imposed is an entirely different question than that disposed of in this supplemental report. If the Constitutional injunction not to deprive anyone of property without due process of law is not violated and an appropriate further proceeding leading to findings sufficient to meet the requirements of the Administrative Procedure Act can be devised, it is entirely possible that the Commission might be able to reopen the proceeding to modify employee conditions. But, as I see it, authority for such a course must come either from section 5(9) of the act under which we may have continuing jurisdiction over labor conditions or as a result of a remand from the court upon its judgment that our findings are defective.

As to any authority retained under section 5(9), it should be noted: (1) that, this being a control case, rather than one where identities are blurred, there is the possibility of feasible divestiture and thus of possible action fair to the parties under such residual jurisdiction, (2) that, unlike the "standard traffic conditions" specified, the "labor conditions" contain no specific retention of jurisdiction to reopen the proceeding for modification of the conditions imposed, and (3) that, even if the Commission has retained jurisdiction of this type in this proceeding, we have not put any of the parties on notice that we were so doing.

In short, it is my position that the Interstate Commerce Commission, whatever other steps may be available to it, is not competent, at this time and in this manner, to add to or subtract from its findings under the guise of clarifying its intention.

But, in any event, if further examination by way of reopening or continuing jurisdiction were permissible in the circumstances, I believe we should, in the interest of

meaningful clarification, get rid of such short-hand references as "Washington Agreement", "Oklahoma Conditions", "New Orleans Conditions", and the like. In the long run they obscure rather than simplify understanding of the actual labor conditions imposed. Further, the labor conditions must be imposed on a case-by-case basis to meet the needs of the particular case, and any generalities concerning those imposed in subsequently decided or future cases seem to me to be singularly inappropriate. I think any revision attempted, therefore, should set forth in explicit self-contained terms the exact conditions imposed, limited to this case: I think by so doing, and by following the same method in future cases, the Commission could avoid misunderstandings of the type which have arisen here.

ORDER

At a General Session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 17th day of February, A. D. 1964.

Finance Docket No. 21400

SOUTHERN RAILWAY COMPANY—CONTROL—
CENTRAL OF GEORGIA RAILWAY COMPANY

Further consideration of the matters and things involved in this proceeding having been made, and the Commission on the date hereof having made and filed its supplemental report clarifying the intent of the conditions imposed for the protection of employees, which report and the prior reports and orders of November 7, 1962, and June 10, 1963, respectively, are hereby referred to and made a part hereof:

It is ordered, That the order entered herein on June 10, 1963, be, and it is hereby, affirmed.

By the Commission.

HAROLD D. McCOY,
Secretary.

(SEAL)